

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

RECEIVED

JUL 20 1995

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of

Amendment of Section 73.202(b))	
FM Table of Allotments)	MM Docket No. 93-136
Clewiston, Fort Myers Villas,)	
Indiantown, Jupiter, Key Colony)	RM-8161, RM-8309, RM-8310
Beach, Key Largo, Marathon and)	
Naples, Florida)	

To: The Commission

DOCKET FILE COPY ORIGINAL

MOTION FOR STAY

Palm Beach Radio Broadcasting, Inc. ("Palm Beach"), licensee of WPBZ(FM),¹ Indiantown, Florida; WSUV, Inc. ("WSUV"), licensee of WROC(FM), Fort Myers Villas, Florida; and GGG Broadcasting, Inc. ("GGG"),² licensee of WJBW, Jupiter, Florida (collectively, "Joint Petitioners"), by their respective attorneys, hereby file their Motion for Stay of the Memorandum, Opinion and Order, DA 95-1250 (Chief, Policy and Rules Division) (released June 14, 1995) ("MO&O") in the above captioned proceeding until the Commission rules on an Application for Review that the Joint Petitioners filed today. The Joint Petitioners satisfy the requirements for granting a Stay of the MO&O. First, they are very likely to succeed with

¹ On June 30, 1995, an assignment of license from Amaturro Group, Ltd. to Palm Beach was consummated for WPBZ (File No. BALH-950223GN). Palm Beach today is filing a Notice of Continued Interest and Intent to Participate as the successor in interest to Amaturro Group.

² On January 27, 1995, an assignment of permit from Jupiter Broadcasting Corporation to GGG Broadcasting was consummated for WJBW (File No. BAPH-940715GE). GGG Broadcasting today is filing a Notice of Continued Interest and Intent to Participate as the successor in interest to Jupiter Broadcasting.

04

their Application for Review. Second, failure to stay the MO&O would result in irreparable harm to the Joint Petitioners by denying upgraded facilities for Joint Petitioners' respective stations. Third, no other party in this proceeding would suffer substantial harm from staying the MO&O. In fact, staying the MO&O and granting the Application for Review would permit each party in this proceeding requesting an upgrade to receive one. Moreover, grant of the Application for Review will resolve alleged Receiver Induced Third Order Intermodulation ("RITOI") Interference. Finally, the provision of wide area service to 1,400,000 listeners through the upgrade of four stations better serves the public interest than upgrading one station. In support thereof, the following is hereby shown.

1. In considering whether a stay of a Commission action should be imposed, the following factors must be considered: 1) the likelihood of success on the merits; 2) whether the petitioner will be irreparably harmed absent such relief; 3) whether the stay would substantially harm other parties interested in the proceedings; and 4) balancing the private interests involved. Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977); Virginia Petroleum Jobbers Assn v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958). The Application for Review provides compelling reasons on procedural and substantive grounds for reversing the MO&O.

2. It is very likely that the Joint Petitioners will succeed with their Application for Review.³ In their Application for Review, the Joint Petitioners persuasively argue that the Allocations Branch's error in rejecting the Joint Counterproposal as incomplete for initially including only a partial reimbursement pledge is contrary to Commission precedent for accepting proposals in rule making proceedings which are substantially complete.⁴ Therefore, the Allocations Branch should have considered the Joint Counterproposal as substantially complete and accepted a supplemental reimbursement pledge made in a subsequent pleading.

3. The Application for Review further argues persuasively that the Allocations Branch applies different standards in processing proposals in rule making proceedings. In particular, the Allocations Branch routinely permits petitioners in rule making proceeding to submit substantially complete applications and correct procedural defects in supplemental filings. But in this

³ The Application for Review is incorporated herein by reference.

⁴ See, e.g. Wewoka, Oklahoma, 9 FCC Rcd 6769, 6769 n.1 (Acting Chief, Allocations Branch) (1994) (petitioners permitted opportunity to cure subscription and verification defect); Woodville, Mississippi, 9 FCC Rcd 5718, 5718 n.1 (Acting Chief, Allocations Branch) (1994) (petitioner failing to include verification and subscription statement in petition permitted to cure defect); Cavalier, North Dakota, 9 FCC Rcd 5713, 5713 (Acting Chief, Allocations Branch) (1994) (petition granted despite failure to include verification and subscription statement); Neenah-Menasha, Wisconsin, 7 FCC Rcd 4594, 4594 n.5 (Chief, Allocations Branch) (1992) (failure of petitioner to serve copy of pleading on other parties in proceeding through inadvertent oversight acceptable); Clintonville, Wisconsin, 4 FCC Rcd 8462, 8462 (Chief, Allocations Branch) (1989) (petitioner failing to include reimbursement pledge in petition permitted to cure defect).

proceeding, the Allocations Branch refused to accept a substantially complete Joint Counterproposal and permit the Joint Petitioners to correct a ministerial error in a supplemental pleading.⁵ It is axiomatic that the Commission must apply the same standards to similarly situated parties. Melody Music, 345 F.2d 730 (D.C. Cir. 1965). The failure on the part of the Allocations Branch to process the Joint Petitioner's Joint Counterproposal in a manner similar to other proposals in rule making proceedings mandates reversal of the MO&O.

4. The Application for Review correctly highlights the failure by the Allocations Branch to apply the same standard of review to two proposals filed in this proceeding. Whereas the Allocations Branch was unwilling to accept the Joint Counterproposal as substantially complete and permit the filing of a supplemental reimbursement pledge, the Allocations Branch did permit another petitioner in this proceeding, Spanish Broadcasting System of Florida, Inc. ("SBSF"), to file a supplemental pleading to its proposal to include a showing of RITOI interference. The Allocations Branch's failure to apply the same processing standards to similarly situated rule making proposals in this proceeding is arbitrary and capricious and constitutes reversible error.

⁵ The arbitrarily and capricious nature of the Allocations Branch decision is readily apparent in light of Mary Esther, Florida, 7 FCC Rcd 1417 (Chief, Allocations Branch) (1991), where the Commission stated that a reimbursement pledge submitted either in counterproposals or before the record closed was acceptable. If a counterproponent could submit a reimbursement pledge during the comment period in a rule making proceeding, then the Joint Petitioners must be provided the same opportunity.

5. Finally, the Application for Review reveals the Allocations Branch's error in failing to consider alternative reference coordinates for a suitable transmitter site for WROC. The need for alternative reference coordinates for WROC from those initially proposed by Joint Petitioners is due to events beyond Joint Petitioners' control. Subsequent to selecting reference coordinates on Sanibel Island, the Allocations Branch issued a decision declaring the portion of Sanibel Island with the proposed reference coordinates as unacceptable because of environmental concerns. When the Joint Petitioners specified new reference coordinates based on a good faith reliance on reference coordinates contained in the Commission's database for an existing allotment for Punta Rassa, Florida, the Allocations Branch rejected the reference coordinates because they specified a site offshore. The Allocations Branch made no effort to consider alternative reference coordinates within the community of Punta Rassa, as Joint Petitioners proposed.

6. Failure to grant the Motion for Stay will result in irreparable harm to Joint Petitioners. Implementation of the MO&O will prohibit the Joint Petitioners from upgrading the facilities of their respective stations.⁶ Granting the Application for Review provides an upgrade for each party seeking to provide wide area service and resolves the alleged RITOI problem. Under the Joint

⁶ Joint Petitioners' proposal to substitute Channel 292C3 for WSGI is mutually exclusive with SBSF's proposal to substitute Channel 292C2 for WZMQ.

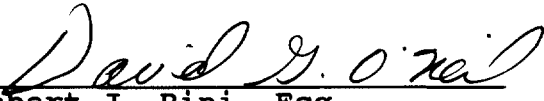
Counterproposal, each party, including SBSF, wins. Consequently, granting the stay will not substantially harm SBSF.

7. Balancing of the private interests involved also dictates that the stay be granted. Reversing the MO&O and granting the Application for Review will permit the provision of wide area service to 1,400,000 new listeners, permit four stations to upgrade their facilities, and will resolve alleged RITOI interference problems.⁷ SBSF proposes to upgrade only one station. Provision of improved service for four stations better serves the public interest than for one station. See Archille-Marcocci Spanish Radio Co., 101 FCC 2d 522 (Rev. Bd. 1985), rev. denied, FCC 86-271 (Comm'n May 30, 1986) (Section 307(b) of the Communications Act is better served by granting proposals for three communities instead of one).

WHEREFORE, for the foregoing reasons, Palm Beach Radio Broadcasting, Inc., WSUV, Inc. and GGG Broadcasting, Inc. request that the Commission grant their Motion for Stay and stay the Memorandum, Opinion and Order.

⁷ The Joint Petitioners note that the RITOI problem probably could be resolved simply by changing the transmitter site for WZMQ without changing channels.

**WSUV, INC.
GGG BROADCASTING, INC.**


Robert J. Rini, Esq.
Evan D. Carb, Esq.
David G. O'Neil, Esq.

Rini & Coran, P.C.
1350 Connecticut Avenue, NW
Suite 900
Washington, DC 20036
(202) 296-2007


Their Attorneys

July 20, 1995

f:\dgo-1\amatur\clewis\pldg\stay.mot

Respectfully submitted,

PALM BEACH RADIO BROADCASTING


Howard J. Braun, Esq.
Jerold L. Jacobs, Esq.

Rosenman & Colin
1300 19th Street, NW
Suite 200
Washington, DC 20036
(202) 463-4640

Its Attorneys

CERTIFICATE OF SERVICE

I, Rhonda R. Parrish, a secretary with the law firm of Rini & Coran, do hereby certify that I caused a copy of the foregoing "Motion For Stay" to be mailed, first-class, postage prepaid, this 20th day of July, 1995 to the following:

*Mr. Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau
Federal Communications Commission
2025 M Street, NW
Suite 8010
Washington, DC 20554

*Mr. John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau
Federal Communications Commission
2025 M Street, NW
Suite 8322
Washington, DC 20554

*Mr. Robert B. Somers
Policy and Rules Division
Mass Media Bureau
Federal Communications Commission
2025 M Street, NW
Suite 8002
Washington, DC 20554

William D. Silva, Esq.
Law Offices of William D. Silva
5335 Wisconsin Avenue, NW
Suite 300
Washington, DC 20015-2003
Counsel for Richard L. Silva

Richard J. Bodorff, Esq.
Wiley, Rein & Fielding
1776 K Street, NW
Washington, DC 20006
Counsel for Key Chain, Inc.

James M. Weitzmen, Esq.
Bruce A. Eisen, Esq.
Kaye, Scholer, Fierman, Hays & Handler
901 15th Street, NW
Suite 1100
Washington, DC 20005
Counsel for Spanish Broadcasting
System of Florida, Inc.

Donald E. Ward, Esq.
Law Offices of Donald E. Ward
1201 Pennsylvania Avenue, NW
4th Floor
Washington, DC 20004
Counsel for Sterling Communications Corp.


Rhonda R. Parrish

* Via Hand Delivery